UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.524
21 June 1996

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-eighth session
Geneva, 6 May-26 July 1996

STATE RESPONSIBILITY

Part One of the draft articles on State responsibility as adopted by the Commission on first reading at its thirty-second session in 1980 and text and titles of Parts Two and Three of the draft articles on State responsibility as provisionally adopted by the Drafting Committee on first reading at the forty-eighth session in 1996

Part One

Origin of international responsibility

CHAPTER I

GENERAL PRINCIPLES

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Possibility that every State may be held to have committed an internationally wrongful act

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

GE.96-62316 (E)

Article 3

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

(a) conduct consisting of an action or omission is attributable to the State under international law; and

(b) that conduct constitutes a breach of an international obligation of the State.

Article 4

Characterization of an act of a State as internationally wrongful

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.

CHAPTER II

THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW

Article 5

Attribution to the State of the conduct of its organs

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

Article 6

Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.

Article 7

Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Article 8

Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

(a) it is established that such persons or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Article 9

Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

Article 10

Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

Article 11

Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

Article 12

Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

Article 13

Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

Article 14

Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that Sate by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15

Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such

attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 16

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

Article 17

Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

Article 18

Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutions a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

Article 19

International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

Article 20

Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21

Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

Article 22

Exhaustion of local remedies

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

Article 23

Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

Article 24

Moment and duration of the breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.

Article 25

Moment and duration of the breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent elements of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Article 26

Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the even continues.

CHAPTER IV

IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

Article 27

Aid or assistance by a State to another State for the commission of an internationally wrongful act

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

Article 28

Responsibility of a State for an internationally wrongful act of another State

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.

2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other articles of the present draft, of the State which has committed the internationally wrongful act.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 29

Consent

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present draft articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 30

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

Article 31

Force majeure and fortuitous event

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

Article 32

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress of if the conduct in question was likely to create a comparable or greater peril.

Article 33

State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.

Article 34

Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 35

Reservation as to compensation for damage

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act.

Part Two*

Content, forms and degrees of international responsibility

CHAPTER I

GENERAL PRINCIPLES

Article 36 [1]

Consequences of an internationally wrongful act

1. The international responsibility of a State which, in accordance with the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in this Part.

2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

Article 37 [2]

Lex specialis

The provisions of this Part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.

Article 38 [3]

Customary international law

The rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part.

Article 39 [4]

Relationship to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.

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* The number within square brackets indicates the number of the corresponding article adopted by the Commission at previous sessions.

Article 40 [5]

Meaning of injured State

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime*, all other States.

CHAPTER II

RIGHTS OF THE INJURED STATE AND OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT

Article 41 [6]

Cessation of wrongful conduct

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

Article 42 [6 bis]

Reparation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:

(a) the injured State; or

(b) a national of that State on whose behalf the claim is brought;

which contributed to the damage.

3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.

4. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

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* The term "crime" is used for consistency with article 19 of Part One of the articles. It was, however, noted that alternative phrases such as "an international wrongful act of a serious nature" or "an exceptionally serious wrongful act" could be substituted for the term "crime", thus, inter alia, avoiding the penal implication of the term.

Article 43 [7]

Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(a) is not materially impossible;

(b) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Article 44 [8]

Compensation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

Article 45 [10]

Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(a) an apology;

(b) nominal damages;

(c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

Article 46 [10 bis]

Assurances and guarantees of non-repetition

The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

CHAPTER III

COUNTERMEASURES

Article 47 [11]

Countermeasures by an injured State

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 41 to 46, the injured State is entitled to take countermeasures, that is, subject to the conditions and restrictions set out in articles 48 to 50, not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary in the light of the response to its demands by the State which has committed the internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46.

2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

Article 48 [12]

Conditions relating to resort to countermeasures

1. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

2. Provided that the internationally wrongful act has ceased, the right of the injured State to take countermeasures is suspended when and to the extent that the dispute settlement procedure referred to in paragraph 1 is being

implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders on the parties.

3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures.

Article 49 [13]

Proportionality

Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 50 [14]

Prohibited countermeasures

An injured State shall not resort, by way of countermeasures to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

(e) any other conduct in contravention of a peremptory norm of general international law.

CHAPTER IV

INTERNATIONAL CRIMES

Article 51

Consequences of an international crime

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in articles 52 and 53.

Article 52

Specific consequences

Where an internationally wrongful act of a State is an international crime:

(a) an injured State's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of article 43;

(b) an injured State's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45.

Article 53

Obligations for all States

An international crime committed by a State entails an obligation for every other State:

(a) not to recognize as lawful the situation created by the crime;

(b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

(c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and

(d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

Part Three

Settlement of disputes

Article 54 [1]

Negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Article 55 [2]

Good offices and mediation

Any State Party to the present articles, not being a party to the dispute may, at the request of any party to the dispute or upon its own initiative, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Article 56 [3]

Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in annex I to the present articles.

Article 57 [4]

Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Article 58 [5]

Arbitration

1. Failing the establishment of the Conciliation Commission provided for in article 56 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Article 59 [6]

Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles, shall operate under the rules laid down or referred to in annex II to the present articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Article 60 [7]

Validity of an arbitral award

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Annex I

The Conciliation Commission

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 56 by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:

(i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The four conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

Annex II

The Arbitral Tribunal

1. The Arbitral Tribunal referred to in articles 58 and 60, paragraph 2 shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

UNITED
NATIONS

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General Assembly

Distr.
LIMITED

A/CN.4/L.525
10 July 1996

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-eighth session
6 May-26 July 1996

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION

Rapporteur: Mr. Igor Ivanovich Lukashuk

CHAPTER IV

STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

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GE.96-62669 (E)

A. Introduction

1. At its forty-fifth session, in 1993, the Commission decided to include in its agenda the topic entitled "State succession and its impact on the nationality of natural and legal persons". 1/ The General Assembly endorsed the Commission's decision in paragraph 7 of resolution 48/31 of 9 December 1993, on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to the Assembly. At its forty-sixth session, in 1994, the Commission appointed Mr. Václav Mikulka Special Rapporteur for the topic. 2/ In paragraph 6 of its resolution 49/51 of 9 December 1994, the General Assembly endorsed the intention of the Commission to undertake work on the topic, on the understanding, once again, that the final form to be given to the work shall be decided after a preliminary study is presented to the Assembly.

2. At its forty-seventh session, the Commission had before it the Special Rapporteur's first report (A/CN.4/467). Following its consideration of the report, the Commission established a Working Group on the topic entrusted with the mandate to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action. 3/ The Working Group submitted a report to the Commission, containing a number of preliminary conclusions regarding the impact of State succession on the nationality of natural persons. 4/ The Commission decided, on the recommendation of the Special Rapporteur, to reconvene the Working Group at the forty-eighth session to complete its task, which will enable it to meet the request contained in paragraph 6 of General Assembly resolution 49/51. 5/

1/ Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10), para. 440.

2/ Ibid., Forty-ninth session, Supplement No. 10 (A/49/10), para. 383.

3/ Ibid., Fiftieth session, Supplement No. 10 (A/50/10), para. 147. For the composition of the Working Group, see para. ... above.

4/ Ibid., Annex.

5/ Ibid., para. 229.

B. Consideration of the topic at the present session

1. Consideration of the second report of the Special Rapporteur

3. At the present session, the Commission had before it the Special Rapporteur's second report (A/CN.4/474), which it considered at its 2435th, 2451st and ... meetings, held on 4 June, 2 and .. July 1996.

4. The Special Rapporteur observed that the purpose of the report was to enable the Commission to complete the preliminary study of the topic and thus comply with the request of the General Assembly. The report was, in particular, designed to facilitate the task of the Working Group on the topic in its preliminary consideration, at the present session, of the questions of the nationality of legal persons, the choices open to the Commission when it would embark on the substantive study of the topic, and a possible timetable.

5. The Special Rapporteur had thought it useful to present a broad picture of State practice, from the nineteenth century to the recent past, in all regions of the world, and regarding different types of territorial changes. He had refrained from analysing such practice, believing that this exercise would form part of the substantive study the Commission would undertake if invited to do so by the General Assembly.

6. The report was divided into an introduction (Chap. I) and three substantive sections. Chapter II dealt with the nationality of natural persons, and attempted to summarize the results of the work already undertaken on that aspect of the topic, to classify the problems in broad categories and to suggest material for analysis at a later stage of the Commission's work. The Special Rapporteur stressed the importance he attached to the views expressed in the Sixth Committee on each of the following specific issues discussed in that Chapter: the obligation to negotiate in order to resolve by agreement problems of nationality resulting from State succession; the granting of the nationality of the successor State; the withdrawal or loss of the nationality of the predecessor State; the right of option; the criteria used for determining the relevant categories of persons for the purpose of granting or withdrawing nationality or for recognizing the right of option; non-discrimination; and the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality.

7. The Special Rapporteur expressed the view that, as far as the problem of nationality of natural persons was concerned, it could generally be inferred that his first report, the preliminary report of the Working Group and

the debates in the Commission and the Sixth Committee provided all the elements necessary to complete a preliminary study of that aspect of the topic.

8. That was not yet the case with the other aspect, i.e. the nationality of legal persons, which was addressed in Chapter III, and which should be the main focus of the Working Group at the present session. The Special Rapporteur had attempted to outline the scope and characteristics of the subject and to bring out its many and considerable complexities, including the various forms that legal persons could take. He observed that, apart from State succession, the problem of the nationality of legal persons arose mainly in the areas of conflicts of laws, the law on aliens and diplomatic protection as well as in relation to State responsibility.

9. The Special Rapporteur pointed out that views had been divided both in the Commission and in the Sixth Committee as to whether a more in-depth consideration of this aspect should be undertaken at the present stage. He himself had expressed, at the previous session of the Commission, his preference for putting that issue aside and for focusing on the nationality of natural persons, but as the Commission had requested more information for the debate, he had felt compelled to respond accordingly.

10. In Chapter IV, containing recommendations concerning future work on the topic, the Special Rapporteur suggested again to divide the subject into two parts, focusing first on the nationality of natural persons. He also recommended that the Commission leave the question of the rule of the continuity of nationality for further consideration in the framework of the topic of diplomatic protection, should the latter be included in the Commission's agenda. As to the working methods, the Special Rapporteur had nothing to add to what he had already said in his first report with regard to the adoption of an approach involving both codification and progressive development of international law, the terminology used, the categories of State succession and the scope of the problem. The Working Group could review those elements and make relevant proposals to the plenary.

11. As to the form which the outcome of the work might take, the Special Rapporteur indicated his preference for elaborating a declaratory instrument consisting of articles accompanied by commentaries. If the Commission agreed with that approach, it might be able to complete its first reading of all the articles and the commentaries in the course of the next session, an option which could also be discussed in the Working Group.

UNITED
NATIONS

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General Assembly

Distr.
LIMITED

A/CN.4/L.526
24 July 1996

Original: ENGLISH

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION

6 May-26 July 1996

CHAPTER I

INTRODUCTION

1. The International Law Commission established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its forty-eighth session at its seat at the United Nations Office at Geneva, from 6 May to 26 July 1996.

A. Membership

2. The Commission consists of the following members:

Mr. Husain Al-Baharna (Bahrain)
Mr. Awn Al-Khasawneh (Jordan)
Mr. Gaetano Arangio-Ruiz (Italy)
Mr. Julio Barboza (Argentina)
Mr. Mohamed Bennouna (Morocco)
Mr. Derek William Bowett (United Kingdom)
Mr. Carlos Calero Rodrigues (Brazil)
Mr. James Crawford (Australia)
Mr. John de Saram (Sri Lanka)
Mr. Gudmundur Eiriksson (Iceland)
Mr. Nabil Elaraby (Egypt)
Mr. Salifou Fomba (Mali)
Mr. Mehmet Gũney (Turkey)
Mr. Qizhi He (China)

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Mr. Kamil Idris (Sudan)

Mr. Andreas Jacovides (Cyprus)

Mr. Peter Kabatsi (Uganda)

Mr. Mochtar Kusuma-Atmadja (Indonesia)

Mr. Igor Ivanovich Lukashuk (Russian Federation)

Mr. Ahmed Mahiou (Algeria)

Mr. Vaclav Mikulka (Czech Republic)

Mr. Guillaume Pambou-Tchivounda (Gabon)

Mr. Alain Pellet (France)

Mr. Pemmaraju Sreenivasa Rao (India)

Mr. Edilbert Razafindralambo (Madagascar)

Mr. Patrick Lipton Robinson (Jamaica)

Mr. Robert Rosenstock (United States)

Mr. Alberto Szekely (Mexico)

Mr. Doudou Thiam (Senegal)

Mr. Christian Tomuschat (Germany)

Mr. Edmundo Vargas Carreño (Chile)

Mr. Francisco Villagran Kramer (Guatemala)

Mr. Chusei Yamada (Japan)

Mr. Alexander Yankov (Bulgaria)

B. Officers and the Enlarged Bureau

3. At its 2426th meeting, on 6 May 1996, the Commission elected the following officers:

Chairman:	Mr. Ahmed Mahiou
First Vice-Chairman:	Mr. Robert Rosenstock
Second Vice-Chairman:	Mr. Mochtar Kusuma-Atmadja
Chairman of the Drafting Committee:	Mr. Carlos Calero Rodrigues
Rapporteur:	Mr. Igor Ivanovich Lukashuk

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, previous Chairmen of the Commission [1] and the

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[1] Namely, Mr. Julio Barboza, Mr. Doudou Thiam, Mr. Christian Tomuschat, Mr. Alexander Yankov and Mr. Rao.

Special Rapporteurs. [2]

5. On the recommendation of the Enlarged Bureau, the Commission, at its 2427th meeting, on 7 May 1996, set up a Planning Group composed of the following members: Mr. Robert Rosenstock (Chairman), Mr. Derek William Bowett, Mr. Carlos Calero Rodrigues, Mr. James Crawford, Mr. Mehmet Gũney, Mr. Kamil Idris, Mr. Mochtar Kusuma-Atmadja, Mr. Ahmed Mahiou, Mr. Vaclav Mikulka, Mr. Alain Pellet, Mr. Pemmaraju Sreenivasa Rao, Mr. John de Saram, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Chusei Yamada.

C. Drafting Committee

6. At its 2427th meeting, on 7 May 1996, the Commission established a Drafting Committee composed of the following members for the topics indicated:

Draft Code of Crimes against the Peace and Security of Mankind:

Mr. Carlos Calero Rodrigues (Chairman), Mr. Doudou Thiam (Special Rapporteur), Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Salifou Fomba, Mr. Qizhi He, Mr. Mochtar Kusuma-Atmadja, Mr. Vaclav Mikulka, Mr. Robert Rosenstock, Mr. John de Saram , Mr. Alberto Szekely, Mr. Christian Tomuschat, Mr. Chusei Yamada, Mr. Alexander Yankov, and Mr. Igor Ivanovich Lukashuk (Ex-officio member).

State Responsibility:

Mr. Carlos Calero Rodrigues (Chairman), Mr. Mohamed Bennouna, Mr. Derek William Bowett, Mr. James Crawford, Mr. Gudmundur Eiriksson, Mr. Qizhi He, Mr. Peter Kabatsi, Mr. Vaclav Mikulka, Mr. Alain Pellet, Mr. Robert Rosenstock, Mr. John de Saram, Mr. Alberto Szekely, Mr. Christian Tomuschat, Mr. Francisco Villagran Kramer, Mr. Chusei Yamada and Mr. Igor Ivanovich Lukashuk (Ex-officio member).

7. The Drafting Committee held a total of 34 meetings on the above topics.

D. Working Groups

8. At its 2435th meeting, on 4 June, the Commission established a Working Group on State succession and its impact on the nationality of natural and legal persons which was composed of: Mr. Vaclav Mikulka (Chairman), Mr. Husain Al-Baharna, Mr. Awn Al-Khasawneh, Mr. Derek William Bowett, Mr. James Crawford, Mr. Salifou Fomba, Mr. Kamil Idris, Mr. Igor Lukashuk, Mr. Robert Rosenstock, Mr.

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[2] Namely, Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Vaclav Mikulka, Mr. Alain Pellet and Mr. Doudou Thiam.

Albert Szekely, Mr. Christian Tomuschat, Mr. Edmundo Vargas-Carreño, Mr. Chusei Yamada.

9. At its 2450th meeting, on 28 June, the Commission established a Working Group on International liability for injurious consequences arising out of acts not prohibited by international law, which was composed of: Mr. Julio Barboza (Chairman), Mr. Husain Al-Baharna, Mr. Mohamed Bennouna, Mr. James Crawford, Mr. Gudmundur Eiriksson, Mr. Salifou Fomba, Mr. Peter Kabatsi, Mr. Igor Ivanovich Lukashuk, Mr. Patrick Lipton Robinson, Mr. Robert Rosenstock, Mr. Alberto Szekely and Mr. Francisco Villagran Kramer.

10. The Working Group on the Long-term programme of work was re-established and was composed of: Mr. Derek William Bowett (Chairman), Mr. James Crawford, Mr. Qizhi He, Mr. Mochtar Kusuma-Atmadja, Mr. Igor Ivanovich Lukashuk, Mr. Alain Pellet, Mr. Robert Rosenstock and Mr. Chusei Yamada.

E. Secretariat

11. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, attended the session and represented the Secretary-General. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Senior Legal Officer, served as Senior Assistant Secretary to the Commission; Ms. Christiane Bourloyannis-Vrailas, Mr. George Korontzis and Ms. Virginia Morris, Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

12. At its 2426th meeting, on 6 May 1996, the Commission adopted an agenda for its forty-eighth session consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. Draft Code of crimes against the peace and security of mankind.
4. International liability for injurious consequences arising out of acts not prohibited by international law.
5. The law and practice relating to reservations to treaties.
6. State succession and its impact on the nationality of natural and legal persons.

7. Programme, procedures and working methods of the Commission and its documentation.

8. Cooperation with other bodies.

9. Date and place of the forty-ninth session.

10. Other business.

G. Summary of the work of the Commission at its forty-eighth session

13. The Commission considered all the items on its agenda. The first seven weeks were allocated mainly to the Drafting Committee for it to complete the second reading of the articles on the draft Code on crimes against the peace and security of mankind, and the first reading of draft articles on State responsibility.

14. The Commission adopted a set of 20 articles constituting the draft Code of crimes against the peace and security of mankind and commentaries thereto (Chapter II below). The Commission recommended that ...

15. The Commission completed on first reading a set of 60 draft articles (with annexes) on State responsibility (Chapter III below). The Commission decided to transmit the draft articles (and relevant commentaries thereto), to Governments of member States for comments to be submitted to the Secretary-General by 1 January 1998.

16. Regarding the topic of State succession and its impact on the nationality of natural and legal persons, the Commission set out its recommendations to the General Assembly regarding the Commission's plan and approach to be followed on that topic in its future sessions (Chapter IV below).

17. Concerning the topic of International liability for injurious consequences arising out of acts not prohibited by international law, the Commission decided to transmit the report of the Working Group on the subject (consisting of 23 draft articles and commentaries thereto) to the General Assembly and to Governments for comments (Chapter V below).

18. With respect to the topic of the Law and practice relating to reservations to treaties, the Commission decided to examine the second report of the Special Rapporteur at its next session (Chapter VI below).

19. With respect to its programme, procedure and working methods and in response to issues raised in paragraph 9 of General Assembly resolution 50/45 of 11 December 1995, the Commission adopted specific conclusions and recommendations which are contained in Chapter VII, Section A, subsection 1 below.

20. With respect to the long-term programme of work, the Commission, inter alia, set out a general outline of the main legal problems raised by

three of the possible future topics which in the view of the Commission are ready for codification and progressive de opment (Chapter VII, Section A, subsection 2 below and Annex II).

21. Other relevant decisions and conclusions are contained in Chapter VII, Sections B, C, D, E and F, dealing respectively with cooperation with other bodies, date and place of the forty-ninth session, representation at the fifty-first session of the General Assembly, the International Law Seminar and the Gilberto Amado Memorial Lecture.

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